

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OCT 4 - 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Parts 21 and 74 of)
the Commission's Rules With)
Regard to Filing Procedures in)
the Multipoint Distribution)
Service and in the Instructional)
Television Fixed Service)

and)

Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

MM Docket No. 94-131

DOCKET FILE COPY ORIGINAL

PP Docket No. 93-253

To: The Commission

EMERGENCY REQUEST
FOR DECLARATORY RULING

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October 4, 1995

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SUMMARY

American Telecasting, Inc. ("ATEL") hereby requests a declaratory ruling by the Commission regarding the appropriate methodology to determine whether an entity is a small business, and accordingly eligible to participate pursuant to Section 21.960 of the Commission's Rules as a designated entity, in the upcoming November 13, 1995 Multipoint Distribution Service ("MDS") auction.

Specifically, the issue is whether, in calculating the average annual gross revenues of an auction bidder and its affiliates for the three preceding calendar years pursuant to Section 21.961(b)(1) of the Rules, by application of Section 121.402(e)(1) of the Rules of the Small Business Administration, to which ATEL was informally referred by a member of the Commission's staff, such revenues must include those of an ongoing business that the bidder acquired and is now operating through a subsidiary which were earned by the seller of the business to the bidder prior to such acquisition. Resolution of this issue is particularly crucial to ATEL, which has, during the past three years, acquired a number of operating wireless cable systems, by which it now provides service to subscribers through its subsidiary corporations.

As demonstrated in this Request, the SBA rule should not apply. The Commission has specifically rejected wholesale importation of the SBA's affiliation rules and has differentiated the MDS auction from other service auctions. Application of the SBA rule by the Commission would be inconsistent with other existing FCC rules and policies applicable to the MDS auction.

Moreover, such application would undermine the well-founded and often expressed objective of the Commission and Congress that the development of wireless cable, as an important competitor to hard-wired cable systems, must be encouraged.

Imputation of such phantom revenues could jeopardize the current and future operations of wireless cable operators such as ATEL by denying them the ability to participate as designated entities, and thus disadvantaging them, in the upcoming auction. Because such a result would greatly impair the ability of such operators to expand their existing wireless cable operations and would seriously compromise their continued provision of service to current subscribers, the FCC's incorporation of this SBA rule would not be in the public interest.

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To: The Commission

EMERGENCY REQUEST
FOR DECLARATORY RULING

Pursuant to Section 1.2 of the Commission's Rules, American Telecasting, Inc. ("ATEL") hereby requests a declaratory ruling by the Commission to confirm that ATEL may participate in the upcoming November 13, 1995 auction of available Multipoint Distribution Service ("MDS") spectrum as a small business pursuant to Section 21.960 of the Rules.^{1/} In light of the imminent October 10, 1995 deadline for the submission of FCC Form 175-M short form applications by bidders in this auction, ATEL asks that this

^{1/} In the alternative, ATEL hereby requests waiver of Sections 21.961 and 1.2110(b)(4) of the Rules to allow such participation. See Sections 21.19 and 1.3 of the Rules. For the reasons noted herein, the grant of such waiver would be fully warranted under the criteria for waiver specified in Section 21.19: (i) the underlying purpose of the MDS rules would be frustrated by application of the rule in question here; and (ii) the unique facts and circumstances render application of the rule inequitable, unduly burdensome and contrary to the public interest. Moreover, as shown herein, good cause exists for such action by the Commission pursuant to Section 1.3.

Request be considered on an expedited basis to avoid any uncertainty for itself and other potential participants in the auction. In the absence of such a Commission ruling by the October 10 filing deadline, ATEL intends to claim small business status in its FCC Form 175-M based upon its understanding of the law as articulated herein.

I. BACKGROUND

ATEL is a publicly-held company that is an operator of wireless cable television systems throughout the United States. As of June 30, 1995, ATEL provided subscription television service to approximately 143,900 subscribers by means of 31 operational systems located in 18 states. ATEL has differentiated itself from its franchise cable competitors both by utilizing its cost structure to offer subscribers lower prices and by emphasizing its strong commitment to customer service. ATEL also holds channel rights in 19 other markets in which it intends to provide such service in the future. About 8.9 million estimated households are situated within the service areas of ATEL's operational and target wireless cable markets.

By Report and Order, FCC 95-230, 78 RR 2d 856 (1995) ("MDS Auction Order") the Commission fundamentally altered its regulation of the wireless cable industry by adopting a new MDS licensing plan. Under the new rules, the FCC will auction one MDS authorization for each of the 487 Basic Trading Areas ("BTAs") and six additional BTA-like geographic areas in the United States. Thus, instead of licensing each MDS channel or channel group on an

individual basis, as it has done, the FCC will select a single authorization holder for each BTA, which will then be able to apply for, construct and operate facilities to provide wireless cable service over any usable MDS channels within the BTA and will also have preferred rights to any available ITFS frequencies and ITFS lease agreements within the BTA. A channel is deemed usable if the proposed station design is in compliance with the FCC's MDS and ITFS interference standards.

Due to the nature of its business, ATEL intends to participate actively in these auctions for several reasons. Most obviously, to the limited extent that vacant wireless cable authorizations exist within ATEL's existing or targeted wireless cable markets, becoming the BTA authorization holder will best guarantee ATEL the use of those channels to ultimately provide programming service to the public over them. Just as important, because of the requirement that existing licensees protect other facilities from interference, obtaining the BTA authorizations for the markets in which it has systems operating or planned will provide ATEL with the flexibility necessary to allow for technical modifications required to meet subscriber demand. Thus, ATEL's ability to participate effectively in the upcoming auction is vital to its continued viability as a provider of video programming by wireless cable.

II. THE FCC'S DESIGNATED ENTITY RULE

In promulgating its rules for the upcoming MDS auction, consistent with the requirements of Section 309(j) of the Communications Act of 1934, as amended, the Commission determined

that "designated entities" participating in that auction would be entitled to substantial benefits to enhance their ability to bid successfully on the authorizations which they target: such entities will be required to pay only 75% of the upfront payments charged other bidders, will receive a 15% bidding credit and, if successful in the auction, will be entitled to pay for their authorizations on an installment basis. MDS Auction Order at 899-902, ¶¶176-189; Section 21.960 of the Rules.

The Commission determined that only bidders deemed to be small businesses would be entitled to designated entity status in the MDS auction. MDS Auction Order at 899-900, ¶¶176-181. In so holding, it adopted the following definition of small business for the MDS auction: "an entity that together with its affiliates has average annual gross revenues that are not more than \$40 million for the preceding three calendar years." Section 21.961(b)(1); see also MDS Auction Order at 902, ¶¶190-192. Section 21.961(b)(2)(i) provides that, to determine whether the applicant is a small business, the gross revenues of the applicant and its "affiliates" shall be considered on a cumulative basis. Section 21.961(d) refers to Section 1.2110(b)(4) for the definition of an affiliate.

III. ATEL'S SMALL BUSINESS STATUS

In anticipation of its participation in the MDS auction, ATEL performed the necessary analysis and calculations required by the FCC's MDS auction rules and definitions and concluded that it is entitled to treatment as a small business. Because ATEL operates its wireless cable systems by means of subsidiary corporations

organized by the community or region in which each such system is located, it included the revenues of each such subsidiary in its calculations. It is the issue of the appropriate methodology for these calculations that is the subject of this Request.

ATEL was formed in 1988 to develop and operate wireless cable systems to provide subscription television service to the public. At the time, ATEL had access to only four MMDS channels licensed to Colorado Springs, Colorado. By entering into leases and contracts with local educators and MDS licensees, ATEL was able to acquire access to the number of channels necessary to allow it to provide effective competition to the franchised cable operators in Colorado Springs. That ATEL system, which commenced operations in December 1989 with 14 channels, currently provides service to over 15,000 subscribers, offering 29 channels of programming.

As a result of its success in Colorado Springs, ATEL sought to expand its operations to other geographic areas, focusing primarily on mid-sized markets in which population densities, demographics and topographical conditions are well suited to wireless cable service. In ATEL's experience, such markets tend to have a larger percentage of uncabled homes than those with higher population densities. ATEL also targeted markets that allow it to cluster operations on a regional basis, enabling it to realize economies of scale by establishing systems in multiple, contiguous markets.

While much of ATEL's expansion into other markets has been the result of its having repeated the process of securing channel rights from individual licensees carried out in developing its

Colorado Springs system, a significant component of the company's business strategy has been to acquire existing wireless cable systems in other markets that meet its selection criteria. Since May 1993, ATEL has acquired 20 operational wireless cable systems in this manner. In 1994, the number of subscribers to ATEL's wireless cable service increased from 31,400 to 106,500, with approximately 56% of this growth attributable to systems acquired during that year and the remainder resulting from internal growth. During that period, ATEL had 26 operational systems, a number that had increased to 31 by June 30, 1995. ATEL has continued to obtain other systems, recently having acquired a wireless cable operation serving Las Vegas, Nevada and having negotiated the acquisition of operating systems in markets such as Rapid City, South Dakota and Sarasota, Florida.

Thus, ATEL has aggressively acquired numerous other wireless cable systems to complement its existing operations during the past three years. Typically, those acquisitions result in the creation of a new ATEL subsidiary to operate the system in question, either by acquiring the stock of the seller or its assets. The determination of whether the transaction is structured as a stock or asset purchase is usually a function of the business and tax requirements of the selling party.

ATEL's calculations reveal that, if the revenues actually earned by it and its affiliates from their respective operations are aggregated, it satisfies the \$40 million annual average gross revenue requirement for the last three years and can accordingly

participate in the auctions as a designated entity. However, while verifying the results of this analysis, counsel was informally referred by a member of the Commission's staff, who has specialized in Personal Communications Services ("PCS") licensing, to the regulations of the Small Business Administration ("SBA").^{2/} As is discussed further below, the Commission has looked to the SBA rules for guidance on certain matters relating to determination of affiliation and small business status. One of the SBA's rules, which has not been incorporated into the MDS or PCS auction rules, could reverse ATEL's conclusion that it is entitled to small business status.

The SBA rule in question, Section 121.402(e)(1) (13 C.F.R. §121.402(e)(1)), is used by the SBA to determine if an entity is entitled to small business assistance from that agency. It provides as follows:

If a concern has acquired an affiliate or been acquired as an affiliate during the applicable averaging period or before small business self-certification, the annual receipts in determining size status include the receipts of both the applicant and the affiliate. Furthermore, this aggregation of the receipts of both the applicant and its affiliate applies for the entire applicable averaging period used in computing size (usually the preceding three complete fiscal years) rather than only for the period after the affiliation arose.

^{2/} Upon initially checking with a member of the Commission's staff who was primarily assigned to MDS auction issues, counsel was told that the issue would be referred to the aforementioned staff member with PCS auction experience.

Thus, the SBA would include the revenues of the applicant's current affiliates, not only during the time after acquisition, but also during the portion of the averaging period that predated acquisition. If ATEL is required to include the pre-acquisition revenues for wireless cable systems prior to the date that it acquired and actually began to operate them, it may not be eligible to participate in the auctions as a small business, to its substantial detriment. However, as is demonstrated below, this SBA rule is inconsistent with the Commission's own affiliation rules and -- more importantly -- could undermine attainment of the Commission's fundamental objective of the MDS auctions to promote viable competition to coaxial cable companies.

IV. THE COMMISSION SHOULD NOT APPLY THE SBA RULE TO MDS AUCTION BIDDERS

In adopting its MDS auction rules, the Commission stated at the outset that it had amended its generic auction rules to replace the SBA small business definition (i.e., an entity with no more than \$6 million net worth and no more than \$2 million in annual profits) with one to be determined after taking into consideration the character and capital requirements of the service in question. MDS Report and Order at 902, ¶190; Section 1.2110(b)(1); see also Competitive Bidding for Licenses (Reconsideration), FCC 94-215, 75 RR 2d 1178, 1207, ¶145 (1994). The Commission stressed that MDS differs from PCS and IVDS, the other services that have been auctioned to date, in several important ways. Unlike PCS and IVDS, wireless cable is "a heavily encumbered service with many of the channels in most major markets already occupied." Moreover,

it is necessary for MDS channels within a geographic area to be aggregated under the control of a single wireless cable operator, to allow it to compete with wired cable television systems in the same area. [cite omitted.] Thus, our goal in this proceeding is not to set the stage for the development of an entirely new industry, such as PCS, but to allow the progression and rationalization of the existing wireless cable industry. Accordingly, we cannot adopt designated entity rules that would hinder the accumulation of MDS channels within BTAs by entities financially capable of operating wireless cable systems and providing competitive service to the public.

MDS Auction Order at 899, ¶173 (emphasis added).

Having so found, the Commission declined to adopt the standard SBA definition of a small business for the MDS auctions, concluding that definition to be overly restrictive. It reasoned that "considerable capital is . . . required to construct a competitive wireless cable system." It confirmed that "the wireless cable industry has historically had difficulty in obtaining financing and that the future success of wireless cable is crucially dependent upon its ability to obtain additional financing." MDS Auction Order at 902, ¶191. The Commission concluded that its adopting the SBA's small business definition "would prevent wireless cable companies with the financial ability to construct systems from obtaining the benefits" offered to designated entities -- eligibility for installment payments, reduced upfront payments and bidding credits. Id at 902, ¶192. It accordingly adopted the \$40 million average annual gross revenue standard that is used to establish small business status in PCS auctions.

The Commission's express rejection of the SBA's definition of small business, both in its generic auction rules and in the MDS rules, indicates that wholesale importation of the SBA's small business rules into the context of the MDS auction would be inappropriate. The Commission has repeatedly confirmed that its affiliation rules are "based in part on the Small Business Administration's affiliation rules," that "the SBA's affiliation rules provide a solid foundation on which to build our own affiliation rules," and that it would be "guided by the SBA rules." Fifth Report and Order, PP Docket No. 93-253, 9 FCC Rcd 5532, 5619, ¶¶201-03 (1994) ("Fifth R & O") (emphasis added). The Commission has also looked to sources other than the SBA for guidance in fashioning its auction eligibility rules.^{3/} Of paramount importance is that the affiliation rules will not be "applied in a manner that defeats the objectives of our attribution rules." Id., ¶204. Thus, the Commission's incorporation of the SBA's small business and affiliation rules has been selective, and an SBA rule should not be deemed subsumed into the Commission's own rules when its application would contravene established Commission rules and objectives.

In the absence of express Commission direction as to the applicability of a particular SBA rule, the context and policy implications of incorporating such rule should be carefully

^{3/} See, e.g., Fifth R & O at 5621-22, ¶208, where the Commission looked to the broadcast rules for guidance in fashioning its PCS designated entity eligibility rules regarding the handling of voting trusts.

examined. In crafting the affiliation rules for PCS, the Commission's concern was that, "[w]ithout affiliation rules, large firms may unfairly avail themselves of the preferences intended for small businesses and other designated entities since they have an incentive to create subsidiaries (that would have access to the parent's substantial resources) to compete against bona fide applicants in the entrepreneurs' blocks." Broadband PCS (Fifth Memorandum Opinion and Order), FCC 94-285, 76 RR 2d 945, 960, ¶38 (1994) ("Fifth M O & O"). Therefore, the use of the affiliation rules "ensures that all financial and other resources available to a company will be considered in assessing its size status." Id. at 960, ¶39.

However, as noted supra, as the FCC noted in its MDS Auction Order at 902, ¶192, and as it stated in fashioning its PCS rules, it should not to use the affiliation rules to decrease the incentives or potential for success of a service provider: "We have a strong interest in seeing entrepreneurs grow and succeed in the . . . marketplace." Fifth M O & O at 958, ¶27. Application here of Section 121.402(e)(1) of the SBA's rules would do just that. Imputation of phantom revenues attributable to the operation of wireless cable systems, now operated by affiliates, during periods in which they were run by others, would critically penalize operators, such as ATEL, that have devoted substantial revenues to acquire such systems to provide service to the public. In this case, ATEL's failure in the auctions would seriously jeopardize both its existing and proposed system operations, which provide

video programming service to subscribers who cannot receive coaxial cable service or provide subscribers with access to such service as a competitive alternative. Both the Commission and Congress have repeatedly articulated the importance of the wireless cable industry as a source of competition to the coaxial cable industry.^{4/} As such, it would be inconsistent with the public interest, should ATEL be deprived of the ability to participate in the MDS auctions as a small business.^{5/}

^{4/} MDS Auction Order, at 363-364, ¶1 ("wireless cable operators that use spectrum in . . . [MDS], often supplemented with leased channels from. . . [ITFS], have begun to provide a competitive alternative to cable. [footnote omitted]. [The new MDS auction rules] will accelerate that process and. . . allow operators [the] flexibility they need to design viable and competitive wireless cable systems." See also, Notice of Proposed Rulemaking, Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, 9 FCC Rcd 7665, 7667-68, ¶3 (1994) ¶¶78-90; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 9 FCC Rcd 7442, 7482-88, ¶¶78-90 (1994).

Congress has also recognized that wireless cable serves as a competitor to cable and should be promoted through national communications policy. H.R. Rep. 48-934, 98th Cong., 2d Sess. (August 1, 1984) (reported at Page 10:729 in Pike and Fischer Radio Regulation). Therefore, in the 1992 Cable Act, Congress specifically enacted Section 628, which makes it illegal for cable operators to "hinder significantly or to prevent any multichannel video programming distributor [including a wireless cable operator] from providing. . . programming." 47 U.S.C. §548 (Section 628 of the 1992 Cable Act). In furtherance of Congress's goal of competition, the FCC is required to report annually to Congress on the status of competition in the market for the delivery of video programming. 47 U.S.C. §548(g).

^{5/} Of further relevance are the delays that have beset the Commission's service auctions since the initial scheduling of the broadband PCS C Block auction. Should the Commission attribute phantom revenues based on current subsidiaries' pre-acquisition operations, an entity that might have been eligible for small business status had the auction been held earlier would be more
(continued...)

The anomaly of attributing the gross revenues of current affiliates of an applicant for any periods prior to the acquisition of the businesses that those affiliates operate is illustrated by an examination of the unjust enrichment rules adopted in the context of broadband PCS, upon which the MDS auction rules are largely based. Section 24.709(a)(3) of the Rules, which requires a C Block PCS licensee to maintain its eligibility or small business status until at least five years from the date of initial license grant, also provides that increases in total assets due to "business development or expanded service shall not be considered." Thus, "normal projected growth of gross revenues and assets, or growth such as would occur as a result of a control group member's attributable investments appreciating, or as a result of a licensee acquiring additional licenses . . . would not generally jeopardize continued eligibility as an entrepreneurs' block licensee." Fifth M O & O at 958, ¶27 (emphasis added).^{5/} Should the Commission expressly allow -- indeed, encourage -- normal business growth and additional system acquisition by a wireless cable operator such as ATEL after the auctions, it certainly should not attribute pre-acquisition phantom revenues to an otherwise qualified small

^{5/}(...continued)

likely to be rendered ineligible by the delay in the auctions--a circumstance over which neither the bidder nor the Commission had any control.

^{6/} Counsel has been informally advised by a member of the Commission's staff that, in response to inquiries since the MDS Auction Order was released, a similar provision for the MDS rules is under consideration, for adoption when reconsideration petitions of that Order are disposed of by the Commission.

business applicant based upon its pre-auction system acquisitions in the same service.

In view of the foregoing, the incongruity of the application of Section 121.402(e)(1) of the SBA's rules to the facts at hand is manifest. Although ATEL has acquired operating wireless cable systems at various times during the relevant three-year period for determining average gross revenues established by Section 21.961 of the Rules, it has had the benefit of the capital resources resulting from these systems only from the date of consummation of each such acquisition. Computation of ATEL's average consolidated gross revenues for calendar years 1992, 1993 and 1994, including all revenues attributable to its acquisitions beginning as of the time made, would result in ATEL's eligibility for small business status. As a leader in the wireless cable industry, ATEL is uniquely poised to compete effectively against the entrenched coaxial cable giants, provided that it can avail itself of the bidding credits, installment payment options and other benefits available to a small business necessary for it to effectively participate in the upcoming MDS auctions. Only the most misguided application by the Commission of Section 121.402(e)(1) of the SBA's rules would require the inclusion of revenues of the systems currently operated by ATEL's affiliates prior to the time of ATEL's acquisition of the systems that they operate. Such result would contravene the workings of the affiliation rules that have already been adopted by the Commission and its underlying and fundamental

objective of promoting the growth of the wireless cable industry as an effective competitor to wired cable.

V. CONCLUSION

In light of the foregoing, the Commission should not apply Section 121.402(e)(1) of the SBA's rules in determining if an MDS auction bidder qualifies for treatment as small business.

Respectfully submitted,

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October 4, 1995

CERTIFICATE OF SERVICE

I, Lilly A. Whitney, a secretary in the law offices of Gurman, Blask and Freedman, Chartered, do hereby certify that I have on this 4th day of October, 1995, had copies of the foregoing "EMERGENCY REQUEST FOR DECLARATORY RULING" hand delivered, to the following:

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